

ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC.
2300 Wilson Boulevard, Suite 300
Arlington, VA 22201

Plaintiff,

Case No.

OFFICE OF MANAGEMENT AND BUDGET,
725 17th Street, N.W.
Washington, D.C. 20503

Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF

1. Plaintiff Associated General Contractors of America, Inc. (“AGC”) brings this action under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), against Defendant, Office of Management and Budget (“OMB” or “the agency”) to compel Defendant to produce documents and data in compliance with FOIA.

2. On August 10, 2018, Plaintiff submitted an FOIA request to the OMB requesting production of all records of all reports that federal departments and agencies have provided to the OMB on or relating to their use of project labor agreements (hereinafter “PLAs”) in accordance with Executive Order 13502 (hereinafter the “Order” or “EO 13502”) and OMB Memorandum M-09-22 (hereinafter the “Memorandum”).

3. This data is a topic of significant public importance and its production is squarely in the public interest. A debate over PLAs and whether they routinely facilitate the construction of improvements to real property has existed for decades and fully informing that debate is necessary to resolve a very critical issue of public policy.¹ While prime construction contractors

¹ Gerald Mayer, Project Labor Agreements, CONGRESSIONAL RESEARCH SERVICE (July 1, 2010) available at: https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1859&context=key_workplace

have used PLAs throughout the nation to construct a wide variety of projects, the percentage of all projects constructed under PLAs remains very small, and in the past, the vast majority of those PLAs have been voluntarily negotiated between private parties. The research on the more general effects that PLAs are likely to have on the construction process, and whether they have the same effects when a public owner requires them, remains inconclusive.² The requested information will provide significant insights into the case-by-case determinations that federal departments and agencies made over a period of several years and yield the most comprehensive data ever assembled on such determinations. In 1998, the Government Accountability Office confirmed that "there is no complete or comprehensive database on the use of PLAs."³ The requested records promise to fill a significant portion of that gap.

4. The request was entitled to processing pursuant to 5 U.S.C. § 552(a)(6)(E)(i)(I).

See also 5 C.F.R. § 1303.40(e)(1).

5. For over a year, OMB unlawfully denied AGC's right to processing of its FOIA request. Plaintiff therefore respectfully requests that the Court compel OMB to process this request on an expedited basis.

6. Defendant has further failed to respond sufficiently to Plaintiff's request. AGC therefore respectfully requests that the Court compel OMB to comply with FOIA and produce the information that is already in OMB's possession and is readily available to be released with very little effort or resource expenditure on OMB's part.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

8. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

² See Id.

³ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, PROJECT LABOR AGREEMENTS: THE EXTENT OF THEIR USE AND RELATED INFORMATION (MAY 1998) available at: <https://www.gao.gov/assets/230/225719.pdf>

PARTIES

9. Plaintiff Associated General Contractors of America, Inc. (“AGC”) is a nationwide trade association of construction companies and related firms. It is incorporated in the District of Columbia and it has served the construction industry since 1918. Today, the association has more than 27,000 members in 89 chapters stretching from Puerto Rico to Hawaii. These members construct public and private buildings, such as offices and apartment buildings, hospitals, laboratories, schools, shopping centers, factories and warehouses. They also construct public and private infrastructure, such as highways, bridges, tunnels, dams, airports, industrial plants, pipelines, power lines, and both clean and wastewater facilities. Notably, these members include both open shop and union companies, for AGC seeks to serve all construction companies, without regard to their labor policies. AGC’s core functions include the following: providing information about the industry and the federal policies that bear on the industry to its members and the public and promoting better relations between public bodies and construction contractors. In the course of performing these functions, AGC hopes to maintain high professional standards for the construction industry, to combat unfair practices, and to support contractors in efforts to rectify conditions of an unsatisfactory nature.

10. Defendant Office of Management and Budget is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1), and is headquartered in Washington, D.C. OMB has possession, custody, and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

11. On February 6, 2009, President Barack Obama issued EO 13502.⁴ The Order “encourage[s] executive agencies to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency

⁴ Exec. Order No. 13,502 available at: <https://www.gpo.gov/fdsys/pkg/CFR-2010-title3-vol1/pdf/CFR-2010-title3-vol1-eo13502.pdf>

12. To implement the Order, the Federal Acquisition Regulation Council issued a final rule (hereinafter “FAR Rule”) on April 13, 2010.⁵

13. To require federal departments and agencies to provide OMB with information on their use of PLAs, OMB issued the Memorandum on July 20, 2010.⁶

14. The Order and the FAR Rule continue to govern the use of PLAs on most of the federal government’s large-scale construction projects. OMB does not, however, continue to gather information on their use, for it rescinded the Memorandum on June 15, 2017.⁷

15. During the period that began on July 20, 2010, and ended on June 15, 2017, the Memorandum required all federal agencies and departments to submit quarterly reports to OMB identifying all contracts awarded in connection with large scale construction projects, including the contract number, dollar value of the total contract award, and the product and service code describing the project.

16. The Memorandum further required that for each such contract, agencies should indicate whether a PLA was required in the solicitation, provide a brief explanation of the considerations in deciding whether a PLA was appropriate for the project, and specify at what organizational level the decision was made.

The FOIA Request

17. On August 10, 2018 Plaintiff submitted a request via email to OMBFOIA@omb.eop.gov, via fax to 202-395-3504, and via First Class Mail to OMB. See Exhibit 1, AGC FOIA Request to OMB.

⁵ 75 Fed. Reg. 19168 (April 13, 2010) available at:
https://www.acq.osd.mil/dpap/cpic/cp/docs/Executive_Order_Final_Rule_PLA-%20Apr_13_2010.pdf

⁶ Peter R. Orzag, Implementation of the President’s Executive Order on Project Labor Agreements (M-09-22), OFFICE OF MANAGEMENT AND BUDGET (July 10, 2009) available at:
https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-22.pdf

⁷ Mick Mulvaney, Reducing Burden for Federal Agencies by Rescinding and Modifying OMB Memoranda (M-17-26), OFFICE OF MANAGEMENT AND BUDGET (June 15, 2017) available at:
<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-26.pdf>

18. AGC sought expedited processing of the OMB FOIA request pursuant to 5 U.S.C § 552(a)(6)(E)(i)(I), as implemented by 5 C.F.R. § 1302.10(c).

19. Expedited processing shall be provided “in cases in which the person requesting the records demonstrates a compelling need . . .” 5 U.S.C. § 552(a)(6)(E)(i)(I). “Compelling need” means requests “made by a person primarily engaged in disseminating information” with an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

20. AGC’s FOIA request to OMB was “made by a person primarily engaged in disseminating information,” and there is an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5. U.S.C. § 552(a)(6)(E)(v)(II); *see also* by 5 C.F.R. § 1303.40(e)(1)(ii).

21. In addition, failure to release the information would impair substantial due process rights. *See* 5 C.F.R. § 1303.40(e)(1)(iii). AGC has a substantial due process interest in obtaining this information because a fully informed debate over PLAs and whether they routinely facilitate the construction of improvements to real property is necessary to resolve a very critical issue of public policy.⁸ While prime construction contractors have used PLAs throughout the nation to construct a wide variety of projects, the percentage of all projects constructed under PLAs remains very small, and in the past, the vast majority of PLAs have been voluntarily negotiated between private parties. The currently available information and data on the more general effects that PLAs are likely to have on the construction process, and whether they have the same effects when a public owner requires them, remains inconclusive.⁹ The requested records promise to enlarge that body of information and data. They will provide significant insights into the case-by-case determinations that federal departments and agencies

⁸ Gerald Mayer, Project Labor Agreements, CONGRESSIONAL RESEARCH SERVICE (July 1, 2010) available at: https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1859&context=key_workplace

⁹ *Id.*

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made over a period of several years and are likely to yield the most comprehensive data ever assembled on such determinations. In 1998, the Government Accountability Office confirmed that “there is no complete or comprehensive database on the use of PLAs.”¹⁰ The requested records promise to fill a significant portion of that gap.

22. There is an urgent need to inform the public about the federal government activity that is the subject of AGC’s FOIA request to OMB.

23. AGC has a history of incorporating information that it derives from government records into reports, articles, and other communications that it then disseminates to its members and their employees, and to members of the public, all for free. AGC has no intention of using the requested records or any conclusions that AGC derives from those records for any commercial purpose. Rather, AGC will incorporate its findings into communications that it disseminates for free. Media outlets also regularly publish information AGC provides.

24. The data that AGC seeks through the FOIA request is directly related to the integrity and viability of the public construction procurement process—an issue which has been a primary focus of news coverage for decades.

25. The subject of AGC’s FOIA request also raises questions about the government’s integrity that affect public confidence. This information is essential in ensuring economy and efficiency in federal procurement and the responsible use of taxpayer dollars in construction procurement.

OMB Response

26. On Tuesday, August 14, 2018, OMB sent Plaintiff an email that merely stated: “This email acknowledges receipt of your Freedom of Information Act (FOIA) request to the Office of Management and Budget (OMB) dated August 10, 2018, and received in the office on August 14, 2018. Your request has been logged in and is being processed. For your reference, the OMB FOIA number is 2018-481.” *See Exhibit 2, OMB Response Email.*

¹⁰ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, PROJECT LABOR AGREEMENTS: THE EXTENT OF THEIR USE AND RELATED INFORMATION (MAY 1998) available at: <https://www.gao.gov/assets/230/225719.pdf>

27. The relevant regulations provide that the FOIA Officer for OMB “will determine

within 20 days (excepting Saturdays, Sundays and legal public holidays) after the receipt of [any requests for information or records] whether it is appropriate to grant the request.” 5 C.F.R. §1303.10(c). The regulations further provide that the FOIA Officer “will immediately provide written notification to the person making the request.” Id. Finally, they explain that “[in] unusual circumstances” this time limit “may be extended” but “for not more than 10 days (excepting Saturdays, Sundays or legal public holidays)” and only “by written notice to the persons making the request.” Id. at §1303.10(f).

28. Nevertheless, Defendant never responded to Plaintiff’s FOIA request in any way whatsoever.

AGC’s Appeal of OMB’s Non-Response

29. On December 5, 2018, AGC appealed OMB’s failure to respond to its FOIA request within the time period required by law. See Exhibit 3, AGC’s Expedited Processing Appeal Letter.

30. In its appeal, AGC noted that OMB’s delay in making its determination and providing AGC with notice of that determination had extended for a period of fifty-six days (excepting Saturdays, Sundays and legal public holidays) beyond the twenty-day deadline. AGC stated that this delay was in violation of both the letter and the spirit of the relevant regulations. *Id.* AGC also stated that it was appealing for a prompt remedy of OMB’s violation and that if OMB’s delay followed or amounted to a determination, without the legally required notice, AGC also appealed that determination.

31. OMB has not responded to AGC’s appeal, in violation of FOIA. *See* 5 U.S.C. § 552(a)(6)(E)(ii) and 5 C.F.R. § 1303.70(a) which states that “[d]eterminations of appeals will be set forth in writing and signed by the Deputy Director, or his designee, within 20 working days.”

32. Together, OMB's non-response for an entire year to AGC's request for FOIA processing, and its failure for over eight months to respond in any way to AGC's appeal of OMB's refusal to provide FOIA processing, render it clear that AGC has constructively exhausted its administrative remedies and fully justifies AGC's request immediate judicial review. See 5 U.S.C. § 552(a)(6)(E)(iii).

33. Because Defendant has "fail[ed] to comply with the applicable time limit provision" of the FOIA, even with the benefit of any extensions of time which AGC might have claimed, AGC is "deemed to have exhausted [its] administrative remedies." See *id.* § 552(a)(6)(C)(i); 5 C.F.R. § 1303.70.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

Wrongful Denial of Expedited Processing of OMB FOIA Request

34. AGC repeats the allegations in the forgoing paragraphs and incorporates them as though fully set forth therein.

35. AGC properly requested records within the possession, custody, and control of OMB on an expedited basis.

36. OMB is an agency subject to FOIA and must process FOIA requests on an expedited basis pursuant to the statutory requirements of 8 U.S.C. §§ 552(a)(6)(A) and 552(a)(6)(B)(i) and the regulatory requirements of 5 C.F.R. § 1303.40(e).

37. One of AGC's core missions is to disseminate information relating to the latest trends and developments in the construction industry, and how the federal government is affecting those trends and developments, to its members and the public via various newsletters, on its website, and in a printed and online magazine entitled *Constructor*. There is an urgent need to inform the public about any significant trends in the way that the Federal Procurement Agencies have evaluated and used PLAs (including any differences among departments and agencies, among regions of the country and/or among categories of construction) during the

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relevant period. AGC has ample capacity to communicate its conclusions to both its members and the public and a long history of disseminating information to both. The federal government activity that is the subject of AGC's FOIA request to OMB meets the statutory criteria for expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(II) and 5 C.F.R. § 1303.40(e).

38. AGC also has a substantial due process interest in obtaining this data

39. OMB's failure to grant expedited processing violates the FOIA.

40. Plaintiff AGC is therefore entitled to injunctive relief requiring OMB to grant expedited processing of AGC's FOIA request of OMB.

41. The records sought by AGC's FOIA request of OMB relate to a matter of widespread and exceptional media interest in which there exists possible questions concerning the government's integrity and due process that affect public confidence, such that expedited processing is appropriate under 5 C.F.R. § 1303.40(e).

42. OMB's failure to grant expedited processing under 5 C.F.R. § 1303.40(e) violates FOIA and OMB regulations.

43. Plaintiff AGC is therefore entitled to injunctive relief requiring OMB to grant expedited processing of AGC's FOIA request to OMB.

COUNT II

Violation of FOIA, 5 U.S.C. § 552

OMB's Failure to Respond to Request Within 20 Days

44. Plaintiff repeats and incorporates by reference the foregoing paragraphs as if fully set forth herein.

45. By failing to respond to Plaintiff's request within the statutorily mandated time period, Defendant OMB has violated its duties under FOIA, *see* 5 U.S.C. § 552 *et seq.*, 5 C.F.R. § 1303.40, including but not limited to its duties to conduct a reasonable search for responsive records, to take reasonable steps to release all reasonably segregable nonexempt information, and to not withhold responsive records.

46. Plaintiff is being irreparably harmed by OMB's violation of the FOIA, and

Plaintiff will continue to be irreparably harmed unless OMB is compelled to comply with the FOIA.

RELIEF

WHEREFORE, Plaintiff respectfully requests the Court:

- (1) order Defendant to expedite the processing of AGC's FOIA request submitted on August 10, 2018;
- (2) order Defendant to conduct a search for any and all responsive records to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to discovery of records responsive to Plaintiff's FOIA request;
- (3) order Defendant to produce, by a date certain, any and all nonexempt records responsive to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under a claim of exemption;
- (4) enjoin Defendant from continuing to withhold any and all nonexempt records responsive to Plaintiff's FOIA request;
- (5) award Plaintiff attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (6) grant Plaintiff such other relief as the Court deems just and proper.

Dated: August 22, 2019

Respectfully submitted,

/s/ Leon Fresco
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